## BRIEF IN SUPPORT OF PETITION.

### I.

**Certiorari should be granted because the decision below avowedly creates a new rule upon a fundamental question of law which constantly arises in all fields of litigation.**

The opinion below concludes with the following language:

> "Thus, there is a dearth of authority upon the question. The truth appears to be that, so far as we can find, the courts have not had it clearly presented to them, as it is presented to us in the case at bar. Being free to decide, and for the reasons we have given, we do not hesitate to hold that, even assuming arguendo that 'mediate data,' decided in the first suit, conclusively establish facts, 'ultimate' in the second, no fact decided in the first, whether 'ultimate' or a 'mediate datum', conclusively establishes any 'mediate datum' in the second, or anything except a fact 'ultimate' in that suit."

This, if correct, brings the case squarely within the provision of subdivision 5(b) of Rule XXXVIII of this court, which is applicable where a Circuit Court of Appeals

> "has decided an important question of federal law which has not been, but should be, settled by this court;"

It will of course be an even stronger ground for certiorari if it can be shown, as it will be, that the law is in fact settled *contra* to the decision below. In that case certiorari may be invoked under the provision of subdivision 5(b) of Rule XXXVIII, which applies where the court below

> "has decided a federal question in a way probably in conflict with the applicable decisions of this court;"

There is no court, nor any field of the law, in which cases of *res judicata* do not constantly arise. A decision by an intermediate court introducing a new principle will result in a chaotic condition. Any such recasting of the law, if made at all, should have the support of the highest judicial authority.

## II.

**The principle of *res judicata* is not limited in its application to matters which are "ultimate facts" in the later suit.**

The opinion below treats the case, to use the much quoted expression of Justice HOLMES, as one of "interstitial" legislation by the court. It is respectfully submitted by the petitioner that, far from having any interstices, the field is crowded with precedents, all applying the principle of *res judicata* to facts which in the later suit were of a merely evidentiary nature. We cite five cases as examples:

*Southern Pacific Railroad Company* vs. *United States*, 168 U. S. 1;

*United States* vs. *Moser*, 266 U. S. 236;

*Burt* vs. *Sternburgh*, 4 Cow. 559;

*Winnipiseogee Lake Cotton and Woolen Manufacturing Co.* vs. *Laconia*, 68 N. H. 284;

*Masters* vs. *City of Rainier*, 238 Fed. 827.

In these cases, facts of a merely evidentiary nature were held to have been conclusively established by findings made in prior suits, as follows:

In *Southern Pacific Railroad Company* vs. *United States*, *supra*, an action by the United States to quiet title to certain land, a finding made in an earlier action affecting other land that certain maps filed by a railroad were of a definite nature.

In *United States* vs. *Moser*, *supra*, an action by an officer of the Navy to recover retirement pay, a finding in an

earlier action that his service during the Civil War as a cadet in the Naval Academy was military service.

In *Burt* vs. *Sternburgh*, *supra*, an action for trespass to land, a finding in an earlier action that the *locus in quo* was within the description of the plaintiff's deed and not within the description of the defendant's.

In *Winnipiseogee Lake Cotton and Woolen Manufacturing Co.* vs. *Laconia*, *supra*, a proceeding to review real estate assessments, the value of the real estate in a year not involved in the proceeding. (The suggestion in the opinion below that this case has been overruled on this point is mistaken.)

In *Masters* vs. *City of Rainier*, *supra*, an action upon a municipal contract, findings in an earlier suit with respect to advertising for bids and similar matters.

The foregoing argument proceeds upon the assumptions that the value of the improved lots is a fact of an evidentiary nature in a case dealing with the value of the partially improved, and that an evidentiary fact is a "mediate datum". Under Point II, however, it will be shown that according to the analysis in the opinion below, the value of improved lots is probably an "ultimate fact" and not a "mediate datum" at all. The distinction between "ultimate facts" and "mediate data", indeed, is one which has never before been made in this field of the law. The cases express the rule in the most comprehensive terms, so that all that is required of the finding in the earlier suit is that it be relevant to the issues in the later. A familiar statement of the general principle is made in *Southern Pacific Railroad Company* vs. *United States*, 168 U. S. 1, 48, as follows:

> "The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

## III.

**The lower Court's distinction between "ultimate facts" and "mediate data" cannot be made according to any fixed principle, or consistently applied in practice.**

It is probably true that in all or some of the cases just cited the facts which we have called evidentiary may be called "ultimate" if we follow the terms of the definition of "ultimate" in the opinion below instead of the meaning which was actually applied in the decision; but if we follow that definition, the facts involved in the instant case are also "ultimate". An "ultimate" fact, according to the lower Court's definition, is:

> "* * * one of those facts, upon whose combined occurrence the law raises the duty, or the right, in question;"

By this definition every necessary link in the chain by which the party establishes his claim or defense is "ultimate". If, for example, the matter to be established is the length of the hypotenuse of a right-angled triangle, one of the ways of proving it is to show the length of the base and the altitude. Those two dimensions are each "one of those facts, upon whose combined occurrence" the conclusion rests. Of course, if circumstances permit, one can actually measure the hypothenuse with a tape measure, and if the measurement is accepted, no resort need be made to the length of the other two sides; but if the results disagree, the length of the other two sides are just as indispensable to the position of the party attacking the accuracy of the physical measurement as the physical measurement is to his adversary. His whole position depends upon the "combined occurrence of those two facts."

In the instant case, the Treasury depends upon something analogous to a physical measurement, *i. e.*, the testimony of an expert that the partially improved lots were worth 35 cents a foot in 1913. The taxpayer meets this

h the allegation (a) that improved lots were worth $1.55
1913, and (b) the cost of full improvement in 1913 was
cents, so that the value of partially improved lots must
ve been $1.35. Those two facts are obviously each "ulti-
te" with respect to the taxpayer's opposition to the
easury, under the language of the lower Court's defini-
n.

Confusion in dealing with such questions must arise if
do not perceive that "facts" may be either affirmative
negative; and that a fact in substance negative may
ke the form of an inconsistent affirmation. If, for exam-
e, A is claiming as the son of X, a finding that A is the
n of Y is affirmative in form, but negative in its relation-
ip to the claim being litigated. Modern courts, in dealing
th questions of *res judicata*, have looked to substance
d not to form. For example, in *Nalle* vs. *Oyster*, 230
S. 165, 181, it was held that a finding that a teacher lacked
e "necessary academic and pedagogic equipment" was
nclusive upon the question whether she had "sufficient
alifications" as a teacher. We have fortunately gotten
ay from such hair splitting as we find in Chief Justice
ALE's judgment in *Fortescue* vs. *Holt*, 1 Ventris 213 (1673),
ere it was held that an allegation in a pleading that J. N.
ed did not deny that J. N. was still alive. So in the
stant case the finding that improved lots were worth $1.55
hen coupled with proof of the cost of full improvement)
substance finds that 35 cents is not the value of partially
proved lots, *i. e.*, in substance it includes the negative of
e Treasury's affirmative, and if the Treasury's affirmative
presses an "ultimate" fact, the taxpayer's negative is
imate in the same sense.

It is true that in order to demonstrate that $1.55 a foot
r improved lots in substance proves the negative of the
easury's allegation of 35 cents for partially improved,
must bring in an independent fact, *i. e.*, the cost of full
provement; but under the analysis of the opinion below,
would seem that both the value of the improved and the
st of full improvement are "ultimate", and that neither

is a "mediate datum" under the lower Court's definition of that innovation in legal science. A "mediate datum" is defined as:

> "* * * a fact, from whose existence may be rationally inferred the existence of one of the facts upon whose combined occurrence the law raises the duty, or the right."

The value of partially improved lots may rationally be inferred from the value of improved lots *and* the cost of full improvement; but the cost of full improvement cannot be rationally inferred from the value of improved lots, nor the value of improved lots from the cost of full improvement; just as the length of the base of the triangle affords no ground for inferring the height, although the base and the height together determine the length of the hypotenuse. We go from these independent and unrelated facts immediately to the conclusion. A "mediate datum", on the other hand, would seem to be some fact which leads not immediately to the conclusion, but only to some point on the road to it.

The Circuit Court of Appeals apparently accepted the conclusion that if $1.55 was the value of the improved lots, $1.35 must be the value of the partially improved. But even if that inference is not necessary, or if other facts may exist which would change the conclusion, the value of $1.55 is none the less "ultimate" in the taxpayer's case. It is necessary to recur to the point that "facts" in controversy have an affirmative and a negative side. To the prosecutor, the fact is guilt; to the defendant, it is innocence. Until the case is decided, that is, there are no "facts", but only opposing hypotheses. An "ultimate fact", therefore, necessarily means ultimate with respect to the hypothesis which one party or the other is trying to establish as truth. It cannot be that the law requires the judge trying the case to classify facts sought to be proved as conclusive or otherwise; because until the case is over he cannot tell what is their final bearing, if any.

While the trial is going on, he is necessarily concerned only with relevancy, not with conclusiveness.

The confusion and uncertainty which the decision below creates arises from the fact that the law does not recognize, and cannot apply, except for limited purposes, any classification of facts into ultimate and subsidiary. Any such classification is necessarily relative, not only to the purpose for which it is made, but to all the circumstances with which the case deals.

The chief, if not the only, purpose for which such a classification has hitherto been attempted is in connection with pleading. We are told that it is only the "ultimate" facts which are to be pleaded; but since, as was said in *Denver* v. *Bowen*, 67 Colo. 315, 317, 184 Pac. 357, 358,

> "The principal if not the only way to determine what is *ultimate* fact is by precedent, * * *"

we are brought back in the end to a mere rule of pleading, which gives us no clue to the organization of that "logical hierarchy" of facts to which Judge HAND refers in his opinion. For example, it is good pleading to allege that the defendant made the contract or committed the tort, though the proof would establish that everything that was done was the act of an agent. The judge who passes upon a demurrer to the complaint must say that the agency is an evidentiary and not an "ultimate" fact; the judge who tries the case, if there were no issue except the agency, would reasonably say that the agency was the "ultimate" question in the case.

It does not, in our opinion, help the discussion to use pseudo-scientific words such as "mediate datum" which, because of their novelty, are less expressive of legal concepts than the technical language which to our profession has an accepted meaning.

## IV.

**The distinction between "ultimate facts" and "mediate data", even if it could be made intelligible, has no relation to the purpose for which the rule of *res judicata* exists.**

The purpose of the rule of *res judicata* as applied to tax cases is to give the Government and the taxpayer "relief from redundant litigation" (*Tait* v. *Western Maryland Railway Co.*, 289 U. S. 620, 624); a corollary of its general purpose "to secure the peace and repose of society by the settlement of matters capable of judicial determination" (*Southern Pacific Railroad Company* v. *United States*, 168 U. S. 1, 49).

In relation to that purpose, any distinction which can be made between ultimate and subsidiary facts has no significance. The purpose is a practical one, and it will be easy to show by examples that for the prevention of wasteful and unnecessary litigation, it is just as important to give conclusiveness to evidentiary facts as to final determinations:

> *Example 1:* A taxpayer has 10,000 bushels of wheat, which in a proceeding in the Tax Court, has been held to have a cost basis of $1.00 a bushel, as a result of which finding he is taxed upon a gain of 10 cents a bushel upon a sale of 1,000 bushels in an unbagged condition. In a later year he sells an additional 1,000 bushels in bushel bags, the bags costing 1 cent each. The ultimate fact with respect to cost in the second case (according to the analysis of the opinion below) is the cost of bagged wheat, *i. e.*, $1.01 a bushel, and the cost of unbagged wheat is subsidiary in the same sense as the value of improved lots in the instant case. It would be absurd to make the question of the applicability of the rule of *res judicata* depend upon the taxpayer's choice to sell the wheat bagged or unbagged.

*Example 2:* A wife brings habeas corpus proceedings against her husband for custody of a child of the marriage. She prevails upon findings that the husband is a drunkard and a criminal, and habitually brutal to the child. She later brings another habeas corpus proceeding to obtain the custody of a second child of the marriage. The findings in the first proceeding are obviously only evidentiary in the second, since the ultimate question in the second is the comparative fitness of the parties for the custody of the second child, which may rest on different considerations than those which applied to the first. It would be a practical absurdity to make the wife establish for the second time the matters as to the husband's character which had been fully litigated in the first proceeding.

## V.

**Justice and public policy, as well as precedent and logic, oppose the lower Court's restriction of the principle of *res judicata*.**

We venture to predict that if this judgment is allowed to stand it will nowhere be more regretted than in the Treasury, because its effect will be enormously to increase the Treasury's administrative burdens. Every disappointed litigant believes that he can do better upon another trial. The decision below offers an opportunity to attack every determination of value as only a "mediate datum" when a related question arises in another year. The grounds of public policy which seemed to the Court below to call for narrowing the doctrine of *res judicata* have no application to such facts as these. The contrary is virtually conceded. The opinion says:

> "Were the law to be recast, it would therefore be a pertinent inquiry whether the conclusiveness, even as to facts 'ultimate' in the second suit, of facts decided

in the first, might not properly be limited to futu
controversies *which could be thought reasonably*
*prospect when the first suit was tried.*"

Here nothing can be clearer than that both the taxpaye
and the Treasury must have contemplated that the que
tions of value litigated in the first case would necessaril
arise again in every year when the cemetery Compan
made sales. The decision in the first case, indeed, specif
cally refers not only to the value of improved lots, but
the cost of making the improvements. It is hard to co
ceive of a case where a litigant could more reasonably hav
looked forward to finality and security so far as 1913 valu
were involved.

WHEREFORE, it is respectfully submitted that this pet
tion for a writ of certiorari be granted.

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## Opinion of the Circuit Court of Appeals.

Before:

L. HAND, SWAN, and AUGUSTUS L. HAND,
*Circuit Judges.*

L. HAND, *Circuit Judge*:

This case comes up upon a petition to review an order of the Tax Court, assessing deficiencies in income tax against the taxpayer for the years 1934 and 1935. The taxpayer is a cemetery company doing business in Brooklyn, in the course of which it sells burial lots. The question at issue is its "gains," (§ 111(a) of the Revenue Act of 1934), upon the disposition of a part of its property during the two years in question; and that in turn depends upon the "basis" which it shall be permitted to deduct from the "amount realized": that "basis" being the value on March 1, 1913, of the property disposed of. § 113(a) (14). The company's property was of two classes: "fully improved" lots, and "partially improved." During the years 1934 and 1935 it sold a number of "fully improved" lots, and the City of New York took over for municipal purposes a large tract, composed of "partially improved" lots. This appeal concerns only the second. The Tax Court allowed, as the "basis" for the sale of the "fully improved" lots, $1.55 per square foot, and, as the "basis" for the "partially improved" lots, $.35 per square foot. It held, as to the value of the "fully improved" lots, that the Commissioner was estopped by a finding of the Board of Tax Appeals in an earlier proceeding, in which the company's income taxes for the years 1929 to 1933 inclusive has been assessed. The Commissioner raises no question as to the correctness of this finding, and has not appealed. The Tax Court refused, however, to compute a "basis" for the "partially improved" lots by deducting from the "basis" of the "fully improved" lots, as found by the Board, the cost of fully improving the "partially improved" lots, which the Board had also found in the first proceeding. The Tax Court altogether disregarded the "basis" of the "fully improved" lots as the Board

had found it, and proceeded to appraise the value of the "partially improved" lots from evidence taken in this proceeding. The taxpayer's position is that the Board's order in the first proceeding, not only estopped the Commissioner as to the value of the "fully improved" lots, but conclusively established that value as an indisputable premise from which, by deducting the cost of the improvements to infer the value of the "partially improved" lots. The taxpayer also asserts that the value of the "partially improved" lots was found in the first proceeding as a necessary step in finding the value of the "fully improved" lots, and in this the dissenting minority of the Tax Court agreed. However, nothing in the record of the first proceeding bears this out; so far as appears, the Board did not first find the value of the "partially improved" lots and then add the cost of improvement. The sole basis for the assumption that it fixed any value for the "partially improved" lots is that, in calculating the value of the "fully improved" lots, it considered as one element the delay necessarily incident to the disposition of all the taxpayer's lots. That is an altogether different matter from fixing the value of those lots as a step from which to proceed to the value of the "fully improved." Again, although it is true that the Board found that the cost of improving the lots was from eight to twenty cents a square foot, that was not necessary to determining the value of the "fully improved" lots, and is not an estoppel. Finally, the taxpayer apparently also asserts that the evidence in this proceeding was not enough independently to support the Tax Court's finding as to the value of the "partially improved" lots, but the testimony of the expert witnesses upon that issue is an answer to this position.

It is of course well-settled law that a fact, once decided in an earlier suit, is conclusively established between the parties in any later suit, provided it was necessary to the result in the first suit. *Southern Pacific R. R. Co.* v. *United States*, 168 U. S. 1, 48; *Tait, Collector* v. *Western Maryland Ry. Co.*, 289 U. S. 620. However, a "fact" may be of two kinds. It may be one of those facts, upon whose combined

occurrence the law raises the duty, or the right, in question: or it may be a fact, from whose existence may be rationally inferred the existence of one of the facts upon whose combined occurrence the law raises the duty, or the right. The first kind of fact we shall for convenience call an "ultimate" fact; the second, a "mediate datum". "Ultimate" facts are those which the law makes the occasion for imposing its sanctions.

The first question is whether, in ascertaining which facts, of those decided in the first suit, are conclusively established, the court in the second suit may go beyond the judgment roll. It has been long the law that it can. *Young* v. *Black*, 7 Cranch. 565; *Doty* v. *Brown*, 4 N. Y. 71, 75; *King* v. *Chase*, 15 N. H. 9. The next question is whether, after the court in the second suit has learned what the court in the first suit actually did decide, the judgment conclusively establishes for any purpose any other facts than those which were "ultimate" in the first suit; that is to say, whether any facts decided in the first which were only "mediate data" in that suit, are conclusively established in the second suit. Some courts hold that only facts "ultimate" in the first suit are conclusively established. *King* v. *Chase*, *supra* (15 N. H. 9); *Winnipiseogee Lake Cotton & Woolen Manufacturing Co.* v. *Laconia*, 74 N. H. 82; *Campbell* v. *Millikin*, 20 Colo. App. 299; *Sullivan Machinery Co.* v. *Stowell*, 80 N. H. 158; *Louisville Gas Co.* v. *Kentucky Heating Co.*, 132 Kentucky 435. (*McCanless* v. *McCanless*, 255 N. Y. 456, 459, may possibly be in line with these.) The same notion was foreshadowed in the often quoted language of COKE: "Every estoppel * * * must be certain to every intent, and not to be taken by argument or inference." Co. Lit. 352b. DEGREY, *C. J.*, probably had the same idea in mind in the *Duchess of Kingston's Case*: "But neither the judgment * * * is evidence of any matter which came collaterally in question * * * nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment." Smith's Leading Cas. 424, 9th Am. ed. 1998, 20 How. St. Tr. (Eng.) 355. On the other hand, other

courts refuse to distinguish between "ultimate" facts and "mediate data" decided in the first suit, so long as they were necessary to the result. *Wright* v. *Griffey*, 147 Ill. 496; *Farmers and Fruit Growers Bank* v. *Davis*, 93 Oregon 655; *Dobbins* v. *Title Guarantee & Trust Co.*, 136 Pac. (2d) 572 (Cal.). We read Freeman on Judgments § 693 as in accord with these cases. We need not choose between these two doctrines, because, as we have seen, the Board decided nothing in the first proceeding which was both a "mediate datum" in that proceeding and necessary to the result.

The important question here is not therefore whether "mediate data" in the first suit are as conclusively established as "ultimate" facts in that suit. On the contrary, we are to decide what are the purposes in the second suit for which anything decided in the first suit—whether "ultimate facts", or "mediate data" therein—are conclusively established. Do the "ultimate" facts, or the "mediate data" decided in the first suit conclusively establish in the second, anything but facts "ultimate" in that suit? Do they also establish "mediate data" in that suit: *i. e.* premises from which to deduce the existence of any of the facts "ultimate" in that suit? That question depends upon quite different considerations from whether "mediate data", determined in the first suit, conclusively establish facts "ultimate" in the second suit.

It is, as we have said, a condition upon the conclusive establishing of any fact that its decision should have been necessary to the result in the first suit. That is a protection, for it means that the issue will be really disputed and that the loser will have put out his best efforts. It can make no difference in this regard whether the original issue was as to an "ultimate" fact or as to a "mediate datum"; the parties can have no interest in what place in the logical hierarchy the issue occupies, if only the final outcome hinges upon it. Altogether different considerations should determine whether any sort of fact, decided in the first suit, should conclusively establish "mediate data" in the second

suit. Indeed, it often works very harshly inexorably to make a fact decided in the first suit conclusively establish even a fact "ultimate" in the second. The stake in the first suit may have been too small to justify great trouble and expense in its prosecution or defense; and the chance that a fact decided in it, even though necessary to its result, may later become important between the parties may have been extremely remote. It is altogether right that the judgment shall forever put an end to the first cause of action; but it is not plain that it is always fair that every fact—"ultimate" or "mediate datum"—decided in it, shall be conclusively established between the parties in all future suits, just because the decision was necessary to the result. What jural relevance facts may acquire in the future it is often impossible even remotely to anticipate. Were the law to be recast, it would therefore be a pertinent inquiry whether the conclusiveness, even as to facts "ultimate" in the second suit, of facts decided in the first, might not properly be limited to future controversies which could be thought reasonably in prospect when the first suit was tried. That is of course not the law as it stands; but if it be proposed to make any fact, decided in the first suit, an indisputable datum in the second, from which the winner may make all rational inferences, the loser's risks become enormously enlarged. It is difficult enough to know to what other possible causes of action a fact found in the first suit will later prove to be "ultimate"; but the field is at least somewhat restricted, particularly because the causes of action to which it can apply are apt to be already in existence. But it is utterly impossible to set even the widest boundaries to the situations in which facts found in the first suit may become relevant as data from which to deduce any facts, "ultimate" in all possible future causes of action. Logical relevance is of infinite possibility; there is no conceivable limit which can be put to it. Defeat in one suit might entail results beyond all calculation by either party; a trivial controversy might bring utter disaster in

its train. There is no reason for subjecting the loser to such extravagant hazards; unless the decisions compel us to go so far, we will not do so.

We have been able to find very little authority upon the point; most of the discussion has been as to whether "mediate data," decided in the first suit, finally establish facts "ultimate" in the second. However, *Winnipiseogee Lake Cotton & Woolen Manufacturing Co.* v. *Laconia*, 68 N. H. 284 (1895) appears to have been in accord with the taxpayer's position here. It concerned taxes, and the issue was as to the fair market value of the taxpayer's property for the year 1893. In the year 1892 the value of this property had been fixed in an earlier tax proceeding, and the court used the value then found as an indisputable datum from which to infer the value for the following year, just as the taxpayer in the case at bar seeks to use the value of the "wholly improved" lots, as fixed by the Board. But that decision was specifically overruled eleven years later in *Winnipiseogee Lake Cotton & Woolen Manufacturing Co.* v. *Laconia, supra* (74 N. H. 82), where the court reverted to the doctrine of *King* v. *Chase, supra* (15 N. H. 9), that a judgment conclusively establishes only facts in "issue" in the first cause of action; and where it held that the value of the property in 1892 had not been an "issue" in the first suit. The taxpayer relies upon *Bedford* v. *Cowtan & Sons, Ltd.* (1916) 1 K. B. 980 (C. A.), in which a question arose in a compensation case as to whether a workman's incapacity had been due to lead poisoning. A medical officer had so certified, and it was agreed that up to the time when the certificate issued, this was conclusive, for the statute expressly made it so. A majority of the Court of Appeal held that it necessarily followed that the workman suffered from lead poisoning during the period after the certificate, and not, as the employer maintained, from Parkinson's disease. They reasoned that, if he had suffered from lead poisoning up to the time of the certificate, his disease could not have turned into Parkinson's disease thereafter. The situation there before the court was, however, quite differ-

ent from that before us. The medical certificate was not given in a separate proceeding, as we understand it; it was to be treated as a step in the compensation case itself. When the statute declared that it should be conclusive, that meant that it should be conclusive for all purposes in that proceeding. Even as it was, Phillimore, J. dissented upon the ground that the certificate could not properly be used as an indisputable datum for the later period; adopting, as we read his opinion, the distinction which we are now making.

On the other hand we have not been able to find any case which holds that facts—"ultimate" or "mediate data"—decided in the first suit, may not be used as indisputable "mediate data" in the second. The statement from Coke could not have had that situation in mind; indeed, as we have said, at the time it was made, the meaning presumably was that the question must be determined from the Judgment roll alone. Theoretically it might have been thought possible that the winner in the first suit could use any fact determined from the roll as "mediate data" in the second; yet that is most unlikely either then, or when the *Duchess of Kingston's* Case, *supra*, was decided. The notion that a jury should be instructed that they might use facts appearing in a judgment roll, as mere evidence in their deliberations would certainly have been foreign to legal notions of those periods. Indeed, we have seen that it has not even yet become wholly settled whether facts decided in the first suit, and therein only "mediate data", conclusively establish facts "ultimate" in the second. The Restatement of Judgments (§ 68 Comment, p. Illustration 14) which we quote in the margin* apparently meant to state the more

* "Evidentiary facts. The rules stated in this Section are applicable to the determination of facts in issue, but not to the determination of merely evidentiary facts, even though the determination of the facts in issue is dependent upon the determination of the evidentiary facts."

"Illustration: 14. A brings an action against B for breach of contract. B denies that he made the alleged contract. At the trial A testifies that on a certain day B signed the contract in New York. C testifies that he saw B in London on that day. Verdict and judgment for B. Thereafter A brings an action against B alleging that B assaulted A on the same day in New York. The judgment in the prior action does not preclude A from proving that B was in New York on the day in question."

restricted position, leaving open the question here at issue: *i. e.*, whether facts decided in the first suit, even though "ultimate" in that suit, may be used as indisputable "mediate data" in the second. In the Illustration the fact decided in the first suit was a "mediate datum" in both suits: possibly, if it had been "ultimate" in the first, the result would have been different.

Thus, there is a dearth of authority upon the question. The truth appears to be that, so far as we can find, the courts have not had it clearly presented to them, as it is presented to us in the case at bar. Being free to decide, and for the reasons we have given, we do not hesitate to hold that, even assuming arguendo that "mediate data," decided in the first suit, conclusively establish facts, "ultimate" in the second, no fact decided in the first, whether "ultimate" or a "mediate datum," conclusively establishes any "mediate datum" in the second, or anything except a fact "ultimate" in that suit.

Order affirmed.